

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2348

UNITED STATES COURT OF APPEALS

Second Circuit

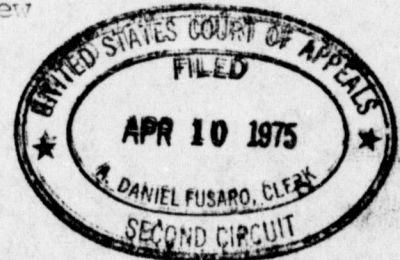
RICHARD PERRY,

Plaintiff,

-against-

POLAND H. ST. PIERRE, Mayor of the City of Plattsburgh, New York; ROBERT BURKE, Alderman, Ward I, City of Plattsburgh, New York; GARY DAME, Alderman, Ward I, City of Plattsburgh, New York; CARL RENNELL, Alderman, Ward II, City of Plattsburgh, New York; MICHAEL HALEY, Alderman, Ward II, City of Plattsburgh, New York; ROBERT GRIFFIN, Alderman, Ward III, City of Plattsburgh, New York; GEORGE POITRAS, Alderman, Ward III, City of Plattsburgh, New York, aforesaid Aldermen being all of the members of the Common Council of the City of Plattsburgh, New York,

Defendants.



ADDITIONAL APPELLANT'S BRIEF

J. BYRON O'CONNELL, ESQUIRE
Attorney for Plaintiff-Appellant
66 Margaret Street
Plattsburgh, New York 12901

WILLIAM P. O'CONNELL
ERASE
CONTAIN CONTENT

FACTS

On January 26, 1973, plaintiff, Perry, sustained an injury that has prevented him since then from performing any police duties for his employer, the City of Plattsburgh, New York. He has been carried as a patrolman for 20 year retirement purposes since July 19, 1955. However, since January 26, 1973 and due to the New York State General Municipal Law, plaintiff, although not functioning as a policeman, has been paid full salary and benefits, including retirement, Blue Cross, Blue Shield, etc.

In New York, policemen and firemen who receive on the job injuries receive whole salary and benefits during the period of time they are incapacitated from performing their employment. The Workmen's Compensation carrier reimburses the City to the extent of its liability. Policemen thus receive all of the emoluments of a policeman who is working but he does not function as a policeman nor is he required to. Plaintiff, Perry, has not functioned as a policeman or performed any of the duties of a policeman since January 26, 1973.

The plaintiff, Perry, between the date of his injury and during his current disability campaigned for and was elected to the position of Clinton County legislator for legislative district in the City of Plattsburgh, New York, where he had been a policeman.

For purposes of this argument, it will be assumed that in order to campaign one has to solicit votes. So between January 26, 1973 and November of 1973, during the course of his campaign and prior to his election and while he was disabled it must be assumed that he solicited votes. Under Section 88 of the City Charter of the City of Plattsburgh, New York, a policeman forfeits his job if he attempts to influence any voter in any election. During the course of the campaign for plaintiff's election, the defendant Mayor, representing the defendant councilmen, advised that the plaintiff's job could be forfeited. Plaintiff, therefore, felt chilled in his exercise in free speech and association as guaranteed by the First Amendment, and applied to the Federal District Court for the Northern District of New York for a temporary injunction enjoining the City of Plattsburgh from violating his civil rights.

On March 14, 1974, the Federal District Court lifted the temporary restraining order it had granted and on March 22, 1974, the Mayor declared the plaintiff's job forfeited. The Federal District Court granted a stay and this Court granted a stay pending appeal.

ISSUE

As to the plaintiff, Perry, is the City Charter, Section 33 unconstitutional and should Judge Foley's order denying the temporary injunction be reversed and should the temporary injunction be granted?

LAW

Perry has been denied equal protection under the law by the statute as it is being applied to him by the defendants. It is certainly facially underinclusive in omitting others in the classified civil service such as firemen, municipal lighting department employees, city yard workers, etc. It is also overinclusive in that the class created as it applies and has been applied to Perry goes beyond the evils that the statute was designed to correct, since the plaintiff was not a hard core plaintiff such as the plaintiffs in the Letter Carriers and Broadrick cases decided by the United States Supreme Court upon which appellee relies.

The purpose of the statute, in the valid exercise of the state police power, was the protection of the integrity of the civil service from corruption to secure impartial administration of justice to prevent police from abusing their discretion and to avoid the loss of public confidence in the police.

How can the appellee seriously urge this Court that Perry, performing no police duties, by campaigning for public office slurred the integrity of the civil service or created any appearance of impropriety? How has Perry jeopardized the character of civil service when he is and was impotent in performing the duties of his office as policeman?

Perry certainly, by the Constitution, has the right to freely express himself, speak out and associate with others of his choice without being forfeited in his job. He has the right to speak, right to assemble, right to petition while on his own time. He has the right to debate uninhibitedly, to discuss the issues, to engage in a robust and wide open controversy, to provide for the voters a multitude of tongues to create a pressure of ideas across the spectrum. As Justice Douglas points out in the *Broaderick* case, "We the people are sovereign, not those who sit in seats of the mighty."

To fence off one group, to bar this group from participation and from public dialogue causes our Republic to suffer. There was no rational basis for prohibiting Perry's speech and association by threatening loss of his job and retirement benefits. Also, the rights of the voters were violated by this attempt to constrict the class of people that could run for public office.

Certainly the statute is vague and facially overbroad, and more than this it is, in the words of Justice White, who wrote the Majority Opinion in

"really and substantially overbroad" as to Perry. Both ~~broaderick~~ and the ~~etter~~ ~~arriers~~ cases will survive a decision in this case for Perry. In both of those cases there was an attack by hard core plaintiffs on facial overbreadth. These hard core plaintiffs were committing the evils the statute was designed to prevent and were impairing the integrity of the civil service.

On the pleadings in this case, Perry had no qualified duty status. The Mayor admits in his answer and affidavit that Perry was on disability leave when he ran for public office and was elected to public office. Certainly the statute is void for vagueness and facially overbroad and ~~under~~inclusive but more important, as to Perry, it is really and substantially overbroad and overconclusive as it applies to him.

Although this Court did not agree with Judge Zavatt in his opinion in *Lecci v. Cahn*, it did not reverse the dicta from "*Pirates of Penzance*"; "When constabulary duty's to be done, to be done. Ah, take one consideration with another, with another. A policeman's lot is not a happy one."

Respectfully submitted,

J. Byron O'Connell, Esq.
Attorney for Plaintiff
66 Margaret Street
Plattsburgh, NY 12901

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: _____

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows; that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: _____

STATE OF NEW YORK, COUNTY OF

SS.: _____

INDIVIDUAL VERIFICATION

deponent is _____ the _____, being duly sworn, deposes and says that in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this _____ day of _____ 19 _____

STATE OF NEW YORK, COUNTY OF

SS.: _____

CORPORATE VERIFICATION

_____ of _____, being duly sworn, deposes and says that deponent is the _____ the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because

is a _____ corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this _____ day of _____ 19 _____

STATE OF NEW YORK, COUNTY OF

SS.: _____

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the _____ day of _____ 19 _____ deponent served the within _____ attorney(s) for upon _____ in this action, at _____

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this _____ day of _____ 19 _____

STATE OF NEW YORK

COURT

COUNTY OF

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Sir:—Please take notice

NOTICE OF ENTRY

that the within is a (certified) true copy of a
duly entered in the office of a clerk of the within named court on

19

NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for settlement to the HON.

one of the judges of the within named Court,

at

on the

day of

19

at

M

Dated,

Yours, etc.

O'Connell and Wolfe

Attorneys for

Office and Post Office Address

66 Margaret Street

Plattsburgh, New York 12901

561-1440

To

Attorney(s) for

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

RICHARD PERRY,

Plaintiff,

-against-

ROLAND H. ST. PIERRE, Mayor of the City
of Plattsburgh, New York; ROBERT BURKE,
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New York; GARY DAME, Alderman, Ward I,
City of Plattsburgh, New York; CARL RENNELL,
Alderman, Ward II, City of Plattsburgh, New
York; MICHAEL HALEY, Alderman, Ward II, City
of Plattsburgh, New York; ROBERT GRIFFIN,
Alderman, Ward III, City of Plattsburgh, New
York; GEORGE POITRAS, Alderman, Ward III,
City of Plattsburgh, New York, aforesaid
Aldermen being all of the members of the
Common Council of the City of Plattsburgh,
New York,

Defendants.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)

) SS.:

COUNTY OF CLINTON)

PATRICIA PANETTI, being duly sworn, deposes and says; that
deponent is not a party to the action, is over 18 years of age and
resides at Plattsburgh, New York. That on the 11th day of April, 1975,
deponent served three copies of Additional Appellant's Brief in the
above entitled matter on Tabner, Carlson, Justice, Daffner and Farrell,
Esqs., attorneys for defendants, at 90 State Street, Albany, New York
12207, the address designated by said attorneys for that purpose by
depositing a true copy of same, enclosed in a postpaid properly
addressed wrapper, in official depository under the exclusive care and

custody of the United States post office department within New York State.

Patricia R. Panetti
PATRICIA PANETTI

Sworn to before me this

11th day of April 1975.

June C. Seymour
Notary Public

JUNE C. SPYMORE

Notary Public, State of New York

Residing in the County of Clinton

My Commission Expires March 30, 1976

74-2348

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within found to be a true and complete copy.

Dated: _____

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows; that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: _____

STATE OF NEW YORK, COUNTY OF

SS.

INDIVIDUAL VERIFICATION

deponent is the _____, being duly sworn, deposes and says that read the foregoing in the within action; that deponent has the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. and knows the contents thereof; that

Sworn to before me, this _____ day of _____ 19 _____

STATE OF NEW YORK, COUNTY OF

SS.

CORPORATE VERIFICATION

of _____, being duly sworn, deposes and says that deponent is the named in the within action; that deponent has read the foregoing the corporation and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because

is a _____ corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this _____ day of _____ 19 _____

STATE OF NEW YORK, COUNTY OF

SS.

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the _____ day of _____ 19 _____ deponent served the within upon _____

in this action, at _____

attorney(s) for _____

the address designated by said attorney(s) for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this _____ day of _____

19 _____

MILLERS FALLS

ESSEX

COTTON CONTENT

STATE OF NEW YORK

COURT

COUNTY OF

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Sir:—Please take notice

NOTICE OF ENTRY

that the within is a (certified) true copy of a
duly entered in the office of a clerk of the within named court on

19

NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for settlement to the HON.

one of the judges of the within named Court,

at

on the day of

19

at

M

Dated,

Yours, etc.

O'Connell and Wolfe

Attorneys for

Office and Post Office Address

66 Margaret Street

Plattsburgh, New York 12901

561-1440

To

Attorney(s) for